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October 4, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

Pursuant to the Commission's filing requirements, the following are being provided with this letter:

- one (1) original and four (4) copies of Verizon's Comments and Supporting Materials in paper form, redacted for public inspection. The filing includes Verizon's Comments and four (4) volumes of supporting attachments.
- Two (2) CD-ROM discs containing Verizon's Comments and Supporting Materials, in electronic form, redacted for public inspection.
- One (1) original of only those portions of the Comments and Supporting Materials that contain confidential information. The confidential material includes three (3) volumes of confidential material in paper form and one (1) CD-ROM disc of material that is only available in electronic form.

Some of the materials we are submitting include confidential information. One (1) copy of this letter will also accompany the confidential portions of the filing. None of this information is disclosed to the public, and disclosure would cause substantial harm to the competitive position of

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Verizon. As such, we are requesting that these portions of the Comments receive confidential treatment by the Commission.

Please date-stamp the extra copy of this letter and return it to the individual delivering this package.

We are submitting a copy of Verizon's Comments, in paper form, redacted for public inspection, to Best Copy (the Commission's copy contractor). In addition, a total of five (5) copies of the Comments and Supporting Materials in paper form and five (5) CD-ROM versions of the Comments and Supporting Materials in electronic form, all redacted for public inspection, are being provided to Janice M. Miles, Wireline Competition Bureau, Competition Policy Division, 455 12th Street, S.W., Suite 5-C327, Washington, D.C. 20554. One (1) copy of the confidential portions of this filing is also being provided to Janice M. Miles.

All inquiries relating to access (subject to the terms of any applicable protective order) to any confidential information submitted by Verizon in support of this Application should be addressed to:

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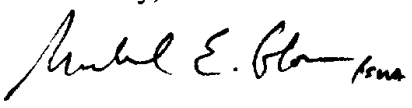
Thank you for your assistance in this matter.

Sincerely,



Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Unbundled Access to Network Elements	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338

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October 4, 2004

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ATTACHMENTS

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Attachment C.	Declaration of Claire Beth Nogay (Special Access)
Attachment D.	Declaration of Eric J. Bruno (Large Enterprise Customers)
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Attachment F.	Declaration of Mohit Patel (Entrance Facilities)
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Attachment K.	Declaration of Thomas Maguire (Hot Cuts)
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Attachment M.	Declaration of Peter J. Castleton (Line Sharing)
Attachment N.	Declaration of Thomas E. Church (Remote Terminal Collocation)
Attachment O.	Mass-Market Switching Maps

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Before the
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Washington, DC 20554

In the Matter of	
Unbundled Access to Network Elements	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338

COMMENTS OF VERIZON[1]

INTRODUCTION AND SUMMARY

The world has changed dramatically since the time that the record was compiled in the *Triennial Review* Proceeding, and these enormous technological and market changes have rendered many of the issues that were debated vigorously during the course of that proceeding effectively moot. In light of these changes, a close examination of the market facts of today reveals that all segments of the telecommunications industry are now subject to intense competition that has emerged entirely without competing carriers relying on unbundled network elements. This is equally true of the mass market that was the subject of intense debate during the prior proceeding and of the high-capacity segment of the business that has been the focus of facilities-based entry since long before the Telecommunications Act of 1996 was passed. In the provision of high-capacity services, competing carriers are competing successfully using a combination of their own facilities, facilities obtained from alternative providers, or special

[1] The Verizon telephone companies ("Verizon") are identified in Appendix A to these comments.

access obtained from incumbent LECs, wherever demand for these services exists. In the mass market, cable operators, Voice over IP ("VoIP") providers, and wireless companies are providing customers across the country voice services that compete directly with ILEC service and that are comparable in price, quality, and functionality. This proceeding provides the Commission with a fresh opportunity to take these market developments fully into account, and to adopt rules that conform to the standards prescribed by the 1996 Act and the binding decisions of the appellate courts and the Supreme Court. Doing so is critical to provide certainty to the industry as a whole, and to allow the industry to move beyond debates about yesterday's issues and get on with the job of building the nation's broadband future.

As an initial matter, the fact that much of the competition in today's marketplace comes from intermodal sources is hardly surprising. On the contrary, in capital intensive industries such as this one, competition typically develops from intermodal sources, not just from a company duplicating the product or service of another company. Thus, railroads not only compete with other railroads, but also with barges, trucks, and airplanes. Passenger airplanes compete among themselves, as well as with passenger railroads and cars. And Federal Express competes not only with United Parcel Service and the Postal Service, but also with telephone-based facsimile service and e-mail. As in these other industries, competition in the telecommunications industry today is coming from both intramodal *and* intermodal sources.

The Commission has long recognized that the market for high-capacity facilities and services is a source of mature competition in telecommunications markets, and that imposing an unbundling obligation in this segment would jeopardize existing facilities-based competition. The evidence provided here shows that that is even more true today than ever before. Wherever demand for high-capacity services and facilities exists, carriers are competing successfully using

a combination of their own or alternative facilities and special access service to serve end-user business customers, and are doing so in many instances more successfully than Verizon itself. Under these facts and the case law that has been developed in five different decisions of the Supreme Court and the D.C. Circuit, the Commission may not require unbundling of high-capacity facilities.

The demand for such high-capacity services is highly concentrated, and is therefore ideally suited for competitive supply. For example, 80 percent of the demand for Verizon's high-capacity special access services is concentrated in roughly 8 percent of its wire centers. In those highly concentrated areas, competing carriers can and have built their own extensive networks. Indeed, just based on the limited data available to it, Verizon has identified competing facilities in more than *two-thirds* of the wire centers in its major metropolitan areas that account for 80 percent of the demand for high-capacity special access services. Moreover, competition is coming from a variety of carriers. Nationally, there are an average of 20 networks in each of the 50 largest Metropolitan Statistical Areas ("MSAs"). In Verizon's territory, we have prepared maps based on publicly available information and our own physical inspections that show not only the location of competing networks, but specific lit buildings served by competing carriers. Competitors include not only large traditional long-distance carriers— that offer a full array of high-capacity services and serve the bulk of the needs for large enterprise businesses but, also smaller carriers that target smaller customers who may need only a single DS1. They also include intermodal providers like cable companies and utilities, which have branched out from their traditional markets to offer high-capacity fiber on a retail and wholesale level.

Competing carriers are not limited to their own networks however. Many of the same carriers competing for retail business offer their fiber to other carriers on a wholesale basis.

Indeed, Verizon's own experience competing for business customers out of its home region is that competing carriers using a combination of their own and other carriers' facilities offer a fully competitive alternative to ILEC services. And other carriers also are successfully serving business customers of all shapes and sizes using special access services purchased from Verizon, either exclusively or to supplement their own facilities or facilities leased from alternative carriers. Inded, the bulk of special access — 80 percent for Verizon — is sold on a wholesale basis to other carriers. Carriers purchase that special access at deep discounts from the monthly tariffed price and use it as yet another avenue for competition. And over 90 percent of the high-capacity services provided by Verizon to competing carriers are purchased as special access, not unbundled elements. This is true for both DS1s as well as DS3s, and is true for the largest carriers as well as the smaller carriers. The detailed maps and lists of types of customers served demonstrate that competitors use those special access services to serve all sizes and types of customers throughout Verizon's service territory. As the D.C. Circuit made clear, where carriers can compete using special access, "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) ("*USTA II*").

Similarly, technological and market developments since the *Triennial Review* proceeding have created extensive competition for mass-market switching throughout the country without competing carriers relying on unbundled switching or the UNE platform. Accordingly, the Commission cannot lawfully require unbundling of these mass-market UNEs. Cable companies offer circuit-switched voice telephone service to 15 percent of homes nationwide, and already offer VoIP service to substantially more homes. By the end of 2004, cable companies plan to

offer VoIP to more than 24 million homes over their networks, and they plan to offer it to more than 40 million homes by the following year. And regardless of whether cable companies offer VoIP, the nearly 90 percent of U.S. homes that have access to cable modem service also have access to VoIP from multiple competitors ranging from the major long-distance carriers such as AT&T to national VoIP providers like Vonage.

Wireless carriers also are aggressively competing with voice telephone services, for both local access lines and traffic. Since the time of the *Triennial Review* proceeding alone, the number of wireless lines has grown from 129 million to 161 million, while the number of wireline access lines has declined. The percentage of users giving up their landline phones has grown from 3-5 percent to 7-8 percent. Wireless has already replaced approximately 11 million wireline access lines, and that number is expected to double by 2008. Moreover, in addition to substituting for entire lines, wireless service is carrying millions of minutes that would otherwise be carried on wireline networks, and is therefore directly substituting to an even greater extent for incumbent carriers' switching services. Wireless traffic has grown from 16 to 29 percent of all voice traffic and to 40 percent of long-distance traffic.

In addition, the Commission should use this proceeding to eliminate any doubt that, unless this Commission finds impairment under 17 U.S.C. § 251(d)(2), incumbents have *no* obligation to provide access to a network element as a UNE at TELRIC rates. Any state commission decision purporting to establish such an obligation is inconsistent with — and therefore preempted by — federal law. The Commission should also reaffirm its exclusive jurisdiction over § 271 and network elements that must be unbundled solely pursuant to § 271, and should make clear that state commissions have no authority to regulate these 271 elements.

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I. SUPREME COURT AND D.C. CIRCUIT PRECEDENTS PROVIDE A CLEAR AND BINDING FRAMEWORK FOR THE COMMISSION'S IMPAIRMENT ANALYSIS

As the Commission adopts and applies an unbundling framework for a *fourth* time, it must, as the Notice acknowledges, follow "the guidance of the *USTA II* court." *NPRM*[2] ¶ 9. The Commission must also adhere to the binding determinations of the Supreme Court in *Iowa Utilities Board*[3] and *Verizon*[4] and of the D.C. Circuit in *USTA I*[5] and *CompTel.*[6] The third consecutive vacatur of the Commission's UNE rules for mass-market circuit switching and high-capacity facilities was due, in large part, to the Commission's failure to follow those earlier rulings. These five court decisions provide the Commission with a clear roadmap for a lawful interpretation and implementation of the unbundling standard in § 251(d)(2). Below, Verizon details the legal principles that must guide the Commission's impairment analysis.

1. The Commission may impose a UNE obligation only after it first makes a finding of impairment, based on substantial evidence, and after it appropriately takes into account the costs of mandating unbundling.

In each of the Commission's previous attempts to adopt unbundling rules — as well as in the *Interim Order* — the Commission has proceeded from the presumption that all network elements must be unbundled (and must be unbundled everywhere) until the Commission

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[2] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, WC Docket No. 04-313 & CC Dockert No. 01-338, FCC 04-179 (rel. Aug. 20, 2004) ("*Interim Order*" or "*NPRM*"), *petition for review pending, USTA v. FCC*, No. 04-1320 (D.C. Cir.).

[3] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[4] *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[5] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

[6] *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*").

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determines that they do not and, as the Supreme Court put it, decides "to soften that obligation by regulatory grace." *Iowa Utils. Bd.*, 525 U.S. at 391. But, as judicial decision after judicial decision has made clear, that premise is simply wrong. The 1996 Act does not authorize the FCC "to create isolated exemptions from some underlying duty to make all network elements available." *Id.* Instead, under the 1996 Act, the provision of UNEs is an exceptional requirement that applies only under statutorily defined circumstances. *See id.* at 390 (finding that, if Congress had intended to authorize "blanket" and "unrestricted" access to UNEs, the Supreme Court found that "it would not have included § 251(d)(2) in the statute at all"). The Supreme Court's decision in *Verizon* similarly establishes that UNE availability is properly limited to true "bottleneck" facilities. 535 U.S at 510, 515-16. The 1996 Act, therefore, requires the Commission, *before* imposing an unbundling requirement, "to determine on a rational basis *which* network elements must be made available," applying the standards prescribed by the Act. *Iowa Utils. Bd.*, 525 U.S. at 391-92.

a. The Commission cannot order *any* unbundling in *any* geographic market or market segment unless it *first* finds that CLECs would be impaired without UNE access in that market.

Congress "made 'impairment' the touchstone" for any requirement that incumbents provide UNEs. *USTA I*, 290 F.3d at 425. As the Commission itself has recognized, it cannot "impose [UNE] obligations first and conduct [the] 'impair' inquiry afterwards." *Supplemental Order Clarification*[7] ¶ 16. Despite this recognition that the Commission must make a finding of impairment with respect to particular geographic markets and market segments *before* it imposes

[7] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd, Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

a UNE obligation in each such market, that is not what the Commission did in the *Triennial Review Order*[8] (or in its prior orders). Instead, with respect to both mass-market switching and high-capacity facilities, the Commission imposed UNE obligations everywhere because it could not determine exactly where competitors are *not* impaired. *See, e.g., Triennial Review Order* ¶¶ 314, 360, 493. The D.C. Circuit vacated these impairment findings because that approach is precisely backwards — the Commission's task is to determine where carriers *are* impaired and to order unbundling only in those areas where the Commission finds substantial evidence of impairment. *See* 359 F.3d at 571, 574. The court, moreover, expressly rejected CLECs' claims that the Commission can "order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved." *Id.* at 579-80.

In this fourth iteration, therefore, there can no longer be any doubt that the Commission must strictly limit its imposition of UNE requirements to those markets and services for which it affirmatively finds that competitors would be impaired without UNE access to particular elements of ILECs' networks.

b. A finding of impairment must be based on substantial record evidence — not conclusory assertions, anecdotal claims, or speculation — and the Commission must also consider evidence demonstrating that competition is possible without UNEs.

To find impairment, the Commission must find that competitors have carried their burden of submitting "substantial evidence" demonstrating that they would be impaired without access

[8] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

to a particular network element as a UNE. *USTA II*, 359 F.3d at 582.[9] That standard requires the Commission to make "a fair estimate of the worth" of the evidence presented. *Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1103 (D.C. Cir. 2001) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)). As courts have held, "conclusory and unsupported remarks," "mere assertions," and "[a]necdotal evidence" all do not constitute substantial evidence. *Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001); *United States v. Undetermined Quantities of Various Articles of Drug . . . Equidantin Nitrofurantoin Suspension*, 675 F.2d 994, 1000 (8th Cir. 1982). Yet, as the *USTA II* panel recognized, the Commission's past findings of impairment have been based on precisely such insubstantial and insufficient evidence. *See* Transcript of Oral Argument at 32-33, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. Jan. 28, 2004) ("Now, is this evidence? Or is this just an argument in a brief? ***And what I'm troubled by is that after the Commission puts out the allegations, the next paragraph says the Commission makes a finding. How can you make findings on the basis o[f] what one party asserts?*** Is there evidence in the record that supports this or are these just assertions?") (emphasis added).

Although Verizon is providing the Commission with all of the relevant information to which it has access, competitors historically have refused to do so, supporting their claims of impairment with the very types of assertions that the D.C. Circuit found so troubling in *USTA II*. But competitors have unique access to information that is central to the impairment inquiry.

[9] The Commission, therefore, erred in the *Triennial Review Order* in refusing to "adopt a 'burden of proof' approach that places the onus on . . . competitors to prove . . . the need for unbundling." *Triennial Review Order* ¶ 92. Because the Commission cannot impose an unbundling requirement unless the record contains substantial evidence demonstrating that competitors would be impaired, the burden falls on competitors to provide such evidence in the first instance.

Among other things, they know where they have deployed fiber networks and packet switches, where they have provisioned their own loops, where they have relied upon third-party facilities, and where they have used special access facilities to provide service. By refusing to submit this information, they put the Commission in the untenable position of having to evaluate their claims of impairment without the facts necessary to do so. For this reason, Verizon and other incumbents have asked the Commission to require competitors to provide, among other things, complete information regarding their deployment of facilities, their use of third-party facilities to provide local services, and their use of special access to provide service to their customers, as well as complete information regarding any offers of the use of their facilities to other carriers or to act as aggregators of traffic from other carriers.[10] The Commission should require competitors that claim impairment to substantiate those claims by providing this information.[11]

In addition, the substantial evidence standard requires the Commission to consider "not only the evidence" that could support a finding impairment, "but also whatever in the record fairly detracts from [the] weight" of that evidence. *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999) (internal quotation marks omitted). The Commission, moreover, is "not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales & Serv., Inc. v.*

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[10] *See* Emergency Request for Access to CLEC Data Relevant to the Impairment Inquiry at 8-9, WC Docket Nos. 04-313, *et al.* (FCC filed Sept. 17, 2004) ("Emergency Request for Access to CLEC Data").

[11] Because "it would hardly seem a difficult matter for the [Commission] to have compiled [this] data" from the competitors — indeed, it is clear that the Commission has the authority to compel the production of this information, *see* Emergency Request for Access to CLEC Data at 5 & n.9 — it would be reversible error for the Commission to fail to do so, as it would be depriving itself of information necessary to make a reasoned assessment of CLEC claims of impairment. *Timpinaro*, 2 F.3d at 459.

NLRB, 522 U.S. 359, 378 (1998). This means that, even if competitors carry their burden by submitting substantial evidence that could support a finding of impairment in a particular market, the Commission cannot impose unbundling without first considering all of the evidence in the record that contradicts the competitors' claims, as well as evidence that unbundling should not be ordered notwithstanding the competitors' showing.

This includes evidence submitted by incumbents, third-party suppliers, and the competitors themselves demonstrating that competition is possible (or is actually occurring) in the very markets or market segments — as well as in markets or market segments with similar characteristics — where certain competitors claim that there is impairment. *See infra* pp. 12-14, 22-24.

It includes evidence that the competitors' claims of impairment ignore the many countervailing advantages that CLECs possess, such as "the advantage CLECs enjoy in being free of any duty to provide underpriced service to rural and/or residential customers and thus of any need to make up the difference elsewhere." *USTA I*, 290 F.3d at 423. That is, CLECs have the considerable benefit of being able to target their marketing to the most lucrative customers rather than building and operating a network that must provide service to all customers, wherever they may be located. CLECs also often enjoy lower labor costs and can deploy the most efficient, newest equipment without regard to whether that equipment is compatible with legacy networks and operating systems. Therefore, even if CLECs may incur higher prices for certain inputs, these advantages can make competition possible and preclude a finding of impairment.

And it includes consideration of the countervailing "costs of unbundling (such as discouragement of investment in innovation)," which the Commission must consider so that its impairment standard is "rationally related to the goals of the Act." *USTA II*, 359 F.3d at 572

(internal quotation marks omitted). Indeed, the D.C. Circuit approved of the Commission's decision in the *Triennial Review Order* to bring "the costs of unbundling . . . into the [impairment] analysis under § 251(d)(2)'s 'at a minimum' language." *Id.* at 576. The court expressly held that the Commission had "reasonably interpreted" the Act to permit it *not* to require incumbents to provide a UNE, "even in the face of some impairment, where such unbundling would" result in "frustration of some of the Act's goals," such as by "pos[ing] excessive impediments to infrastructure investment." *Id.* at 579-80. And the D.C. Circuit rejected CLECs' claims that consideration of such costs is unlawful, holding that, "far from barring consideration of factors such as an unbundling order's impact on investment, . . . the Act, as interpreted by the Supreme Court in [*Iowa Utilities Board*], . . . *mandate[s] exactly such consideration*." *Id.* at 580 (emphasis added).

2. The fundamental question posed by the impairment standard is whether competition is *possible* — not whether actual competition is already occurring or whether markets are already fully competitive.

In *USTA II*, the D.C. Circuit reaffirmed that the critical inquiry is whether CLECs are *capable* of competing without UNEs — that is, whether "competition is possible" without UNEs in a particular market. *Id.* at 575; *see also id.* at 571 (issue is "whether a market is suitable for competitive supply"). As that court held in *USTA I*, impairment exists only for those network elements that are "*unsuitable* for competitive supply." 290 F.3d at 427 (emphasis added). Impairment, therefore, does not exist in a particular market merely because no competitor has entered that market without relying on a particular UNE or combination of UNEs.[12] This is

[12] Indeed, given that the Commission has, for eight years, required UNE access to core portions of the incumbents' networks *without* a lawful finding of impairment, it should come as

merely a reflection of the statutory standard, which focuses on the "ability" of competitors to enter markets. 47 U.S.C. § 251(d)(2). And it is made clear by the D.C. Circuit's holding, discussed further below, that the Commission may not assume that each geographic market is unique and "treat competition [i]n one [market] as *irrelevant* to the existence of impairment [i]n the other" markets in the country, where there is no actual competition. *USTA II*, 359 F.3d at 575.

Just as the impairment standard does not establish an "actual competition" test, the Commission also cannot require the presence of *multiple* competitors in a market as a predicate for a finding that competitors are not impaired. This backward-looking focus on whether a market is already fully competitive is affirmatively inconsistent with the 1996 Act. A network element, moreover, is *suitable* for competitive supply long before three or four companies are competing without obtaining that element as a UNE. Indeed, for decades, there were only three facilities-based long-distance providers, but the Commission never suggested that the market was characterized by natural monopoly; on the contrary, it found the market to be highly competitive. *See AT&T Non-Dominance Order*[13] ¶ 35.

In the *Triennial Review Order*, the Commission paid lip service to the fact that the impairment standard does not create an "actual competition" test. *See, e.g., id.* ¶ 506 ("we expect states to find 'no impairment'" where evidence demonstrates "the *potential* ability of competitive LECs" to compete without UNEs). But the Commission not only unlawfully left it to the state

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no surprise that competitors have not relied as much as possible on non-UNE methods of competition. *See USTA I*, 290 F.3d at 425 ("the existence of investment" in facilities despite the Commission's UNE rules "tells us little or nothing about incentive effects"; instead, the "question is how such investment compares with what would have occurred in the absence of the prospect of unbundling").

[13] Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*").

commissions to conduct the impairment inquiry, but also, as the incumbents explained, structured the potential impairment inquiry in a manner that was "so open-ended that it imposes no meaningful constraints on unbundling, and would be unlawful even if applied by the FCC itself." *USTA II*, 359 F.3d at 571. Moreover, the only specific standard that the Commission adopted for application by the states was an *actual* competition standard that required the presence of *multiple* competitors — requiring, in effect, *fully competitive* markets before a finding of no impairment was mandated. As shown above, this standard is flatly contrary to the requirements Congress established, which permit a finding of impairment and a requirement of unbundling only when competition is not possible.

3. The impairment analysis also must focus on whether *competition* is possible — not on the interests of individual competitors, classes of competitors, or technologies.

The "goal[] of the Act" is to "stimulate *competition* — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576 (emphasis added). Congress did not establish the unbundling obligation to subsidize specific competitors or classes of competitors, relying on specific technologies, so that they can use TELRIC-priced UNEs to compete not only with incumbents, but also with other competitors that receive no such subsidy. The impairment standard, moreover, must have a "limiting" principle that is "rationally related to the goals of the Act." *Iowa Utils. Bd.*, 525 U.S. at 388. In conducting the impairment analysis, therefore, the Commission must consider whether competi*tion* is impaired — not whether particular competi*tors* are impaired. That is because the 1996 Act does not authorize the Commission "to inflict on the economy the sort of costs" associated with unbundling — "one of the most intrusive forms of economic regulation" and "one of the most difficult to administer," *Triennial*

Review Order ¶ 141 — without "reason to think doing so would bring on a significant enhancement of *competition*." *USTA I*, 290 F.3d at 429 (emphasis added).

For these reasons, the D.C. Circuit has expressly rejected the claim that the impairment standard can be read narrowly, in terms of a competitor's specific business plan or preferred technology. Thus, in *USTA I*, the D.C. Circuit found "quite unreasonable" the Commission's contention that it could define the service that a competitor seeks to offer as "DSL" and, therefore, limit its impairment inquiry to copper loop facilities, as opposed to broadband facilities generally. 290 F.3d at 429. In *USTA II*, in contrast, the D.C. Circuit affirmed the Commission's revised determination, again in the broadband context, that "intermodal competition in broadband, particularly from cable companies, means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources." 359 F.3d at 580 (citing *Triennial Review Order* ¶ 292). In other words, even if the class of competitors seeking to provide broadband in the same manner as incumbents could not do so without UNEs, that does not support a finding of impairment because *competition* — by another class of competitors, using a different platform — is possible. *See id.* at 582 ("even if all CLECs were driven from the broadband market, mass market consumers *will still have the benefits of competition*") (emphasis added).

These principles are not limited to the broadband context. They apply equally to all elements for which the Commission conducts an impairment inquiry, including those at issue here. Thus, the Commission could not require unbundling even if a particular class of competitors — for example, competitors that seek to compete using circuit-switched networks — could demonstrate that they cannot compete without UNEs. The relevant question, instead, is whether competition is possible generally, including competition from alternative network

platforms or technologies, even if particular competitors cannot enter the market. As courts have long recognized in the antitrust context, the "policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors," and "though there is a sense in which the exclusion of any competitor reduces competition, it is not the sense of competition that is relevant." *Marrese v. American Acad. of Orthopaedic Surgeons*, 706 F.2d 1488, 1497 (7th Cir. 1983) (Posner, J.), *rev'd on other grounds*, 470 U.S. 373 (1985); *see also USTA I*, 290 F.3d at 424 ("completely synthetic competition would [not] fulfill Congress's purposes").

Despite this, in the *Triennial Review Order*, the Commission held that impairment could be found even in markets that met the Commission's (vacated) self-provisioning trigger for mass-market switching — that is, where three *or more* CLECs are already serving mass-market customers using their own switches in a particular market — if some "exceptional barrier to entry" prevented "further entry" into that market by a fourth or fifth (or fiftieth) CLEC. *Triennial Review Order* ¶ 503. But, in any markets where competition is possible without UNEs, as it is for example in markets where competition is already present, there can be no serious claim that competition without UNEs is impossible and the inability of still another competitor to enter the market can never justify a finding of impairment. *See Marrese*, 706 F.2d at 1497 ("a consumer has no interest in the preservation of a fixed number of competitors").

4. *All* available means of providing service in competition with incumbent local exchange carriers must be considered.

a. The Supreme Court rejected the Commission's initial attempt to "limit[] its [impairment] inquiry to the incumbent's own network," holding that the "Commission cannot, consistent with the statute, blind itself to the availability of elements *outside* the incumbent's network." *Iowa Utils. Bd.*, 525 U.S. at 389 (emphasis added). As the Court explained, by

presuming that competitors would only "seek access to network elements from an incumbent" if it were impaired without such access, "entrants, rather than the Commission, [would] determine whether . . . the failure to obtain access to nonproprietary elements would impair the ability to provide services." *Id.* As the D.C. Circuit subsequently made clear, the Supreme Court's holding means that the Commission must consider competition through competing platforms that do not utilize the incumbents' networks at all. Thus, in *USTA I*, the D.C. Circuit found that the Commission's *Line Sharing Order*[14] demonstrated an unlawful "naked disregard of the competitive context," given the Commission's refusal to consider, as part of its impairment analysis, the existence of "robust competition, and the dominance of cable, in the broadband market." 290 F.3d at 428-29. In *USTA II*, the D.C. Circuit reaffirmed the necessity of looking at competitive alternatives outside of the incumbents' network, holding that, in light of the "competition from cable providers," consumers "will still have the benefits of [the] competition" — which is the goal of the 1996 Act — "even if *all CLECs* were driven from the broadband market." 359 F.3d at 582 (emphasis added).

In *USTA II*, the D.C. Circuit also reaffirmed the more general point that, in conducting an impairment analysis, "the Commission cannot ignore intermodal alternatives." *Id.* at 572-73; *see USTA I*, 290 F.3d at 429. Indeed, intermodal competition should be *favored* under the 1996 Act. As the Supreme Court has recognized, true competition occurs only with respect "to 'unshared' elements." *Verizon*, 535 U.S. at 510 n.27; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("It is in the *un*shared, not in the shared, portions of the

[14] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

enterprise that meaningful competition would likely emerge."). And the Commission has recognized that it is only where competitors have "direct control of their networks" — which is true, by definition, of intermodal competitors — that they can "ensure the quality of their service and to offer products and pricing packages that differentiate their services from the perspective of end users." *UNE Remand Order*[15] ¶ 112. Consumers, moreover, benefit far more from intermodal competition — for example, both VoIP and wireless offer consumers features that are not available through circuit-switched networks — than they ever did (or could) from UNE-P providers, which were merely reselling the incumbents' networks. In this manner, VoIP and wireless are to incumbents' circuit-switched networks what trucks, barges, and air freight carriers are to railroads — competitive supply alternatives — even though they do not duplicate any rail facilities. *See* Declaration of Alfred E. Kahn and Timothy J. Tardiff ¶ 9 (Attachment A) ("Kahn/Tardiff Decl.").[16]

In the *Triennial Review Order*, however, the Commission discounted intermodal competition because such competition is not open to all would-be competitors. In other words, rather than recognizing that the 1996 Act is concerned with opening markets to competition, in

[15] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

[16] And trucks, barges, and air-freight carriers compete with railroads by offering comparable, but not identical, services. Indeed, it is precisely because these competing services are not identical that companies can engage in both price and non-price competition for the same basic service — carriage from point A to point B. The fact that intermodal alternatives have characteristics different from wireline service — including some superior to wireline service — does not change the fact that they are substitutes for, and compete with, each other in the same market. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").

whatever form, the Commission read the Act as designed to ensure that individual competitors have enduring wholesale suppliers. Thus, the Commission discounted competition from cable companies — competition that has grown exponentially in the years since the record was compiled in the *Triennial Review* proceeding — because those companies have advantages "not available to other new entrants," and from cable and wireless companies because "intermodal technologies will only be available to one or a few firms." *Triennial Review Order* ¶ 98. And the Commission discounted intermodal alternatives that "do not contribute to the creation of a wholesale market" — in other words, that do not promote the interests of individual competitors, regardless of the benefit to consumers. *Id.* Most extreme, the Commission discounted intermodal competition that uses neither ILEC switches nor loops, because some competitors might elect to compete, instead, using their own switches and ILEC loops. *See id.* ¶ 446. This is circular. The only entrants that would count under these criteria are those that depend on the ILECs' networks. In each of these instances, therefore, the Commission erred. Where intermodal competition exists, and such companies are competing successfully, there can be no finding of impairment, irrespective of whether other companies, using different technologies, can do so.

b. Just as the Supreme Court held that the Commission cannot ignore competition using facilities *outside* of incumbents' networks, the D.C. Circuit rejected the Commission's later attempt to exclude from the impairment inquiry competition using non-UNE facilities *inside* of incumbents' network. Indeed, the D.C. Circuit repeatedly stressed that the Commission cannot "omit consideration of [ILEC-provided] alternatives in its impairment analysis" and, instead, "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *USTA II*, 359 F.3d at 577; *see id.* ("What

the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs.").[17]

The D.C. Circuit recognized that competitors can obtain the same facilities from incumbents as UNEs and special access and, therefore, that the primary difference between them is one of price. And the court held that the Commission, as part of its impairment analysis, must consider whether competitors *need* the price break that comes with UNE pricing. *See, e.g., id.* The D.C. Circuit's conclusion in this regard follows directly from the Supreme Court's ruling that the Commission cannot regard "*any* increase in cost (or decrease in quality) imposed by denial of a network element" as a UNE as a source of impairment warranting imposition of unbundling under § 251(c)(3). *Iowa Utils. Bd.*, 525 U.S. at 389-90. Such an interpretation of the 1996 Act, the Court held, "is simply not in accord with the ordinary and fair meaning" of the terms Congress used. *Id.* at 390. Therefore, a competitor is not "impaired in its *ability* to provide services" when it can "receive a handsome profit" without UNEs, even if it could receive "an even handsomer one" with UNEs. *Id.* at 390 n.11. Consistent with the Court's holding, the D.C. Circuit held in *USTA II* that, where "competitors have access to necessary inputs [through special access] at rates that allow competition not only to survive but to flourish," there is no "need for the Commission to impose the costs of mandatory unbundling." 359 F.3d at 576. Indeed, in such circumstances "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates." *Id.* at 592.

[17] Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (Aug. 20, 2004).

This is precisely the analysis that the D.C. Circuit applied in the context of wireless and long-distance carriers, where the court directly addressed the availability of special access and the impairment analysis. With respect to wireless carriers, the court found that the record "clearly show[ed] that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic." *Id.* at 575. Indeed, the court noted that "[t]he FCC and the wireless intervenors do not challenge" this conclusion. *Id.* at 576. And the court rejected each of the Commission's rationales for why wireless carriers should be able to replace those special access facilities with cheaper UNEs despite the absence of any evidence of impairment. *See id.* at 576-77. Similarly, with respect to long-distance carriers, the court noted that "CLECs have pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services" given their success in competing in that market using special access. *Id.* at 592. And the court stressed that in these circumstances — "where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic" — carriers "cannot generally be said to be impaired." *Id.*[18]

[18] For these reasons, the Commission's grounds in the *Triennial Review Order* for distinguishing dark fiber loops and transport, as to which it found impairment, from OCn loops and transport, as to which it found no impairment, are insufficient under any lawful impairment analysis. The Commission found that CLECs are impaired without UNE access to dark fiber based on CLECs' claims that dark fiber both "integrates more efficiently into their networks" than obtaining lit fiber from incumbents and enables them to avoid the "costs of self-deploy[ment]." *Triennial Review Order* ¶¶ 311 n.910, 383. But the Commission gave no consideration to whether competitors can compete using incumbents' special access — as shown below, there can be no doubt that they can. And, even crediting the CLECs' assertions that UNE dark fiber provides more efficiencies than incumbent "lit" fiber, those increases in efficiency cannot, standing alone, demonstrate that CLECs cannot compete without UNE dark fiber — especially when UNE dark fiber offers no efficiency advantages over self-provisioning and the Commission found that CLECs can and do self-provision OCn fiber. *See id.* ¶¶ 315, 382, 389. Finally, the Commission improperly compared UNE dark fiber to CLECs' self-provisioning of *dark* fiber. *See id.* ¶ 315 n.931. But CLECs that seek UNE dark fiber do not leave it dark; they

5. The Commission must consider whether an *efficient* competitor can compete — the analysis cannot turn on the particular business plans or capabilities of individual competitors.

As the D.C. Circuit recognized, an impairment inquiry must answer the question — "Uneconomic by whom?" — to ensure that the impairment inquiry is not "vague almost to the point of being empty." *USTA II*, 359 F.3d at 572. There is only one possible answer that is consistent with the goals of the 1996 Act: there is no impairment if entry is possible by an efficient CLEC. In fact, this is the standard that the CLECs themselves have argued "is inherent in the FCC's" impairment analysis.[19] And it is the only standard consistent with the Commission's recognition that focusing on "individual requesting carriers" and their "particular business strateg[ies]" would "reward those carriers that are less efficient." *Triennial Review Order* ¶ 115. If an efficient carrier can enter a market and compete without UNEs at all, or without specific UNEs, then competition, by definition, is *possible* without those UNEs. In such circumstances, there is no justification for requiring incumbents to provide such UNEs to other, less efficient carriers, or to carriers that have adopted less efficient business plans.

6. Evidence of actual competition — while not necessary to preclude a finding of impairment — is dispositive evidence that competition is possible without UNEs, both in that market and in all similarly situated markets.

a. The question whether an efficient competitor can enter a market and compete without UNEs becomes a simple one when there is evidence of actual competition without

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use it as a substitute for lit fiber, whether self-provisioned, obtained from third parties, or obtained from incumbents.

[19] *See* Letter from David W. Carpenter, Counsel for AT&T Corp., to Hon. Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, Nos. 00-1012, *et al.* (D.C. Cir. filed Jan. 29, 2004).

UNEs. In the face of such evidence, the Commission cannot find impairment and cannot order unbundling. If an *actual* carrier is competing successfully without UNEs, then it is necessarily the case that an *efficient* carrier could do so and that competition is possible. Therefore, in any market where the existence of an actual competitor demonstrates that competition is possible without UNEs — whether by using its own facilities, third-party facilities, the ILEC's facilities purchased as special access, or a combination thereof — the Commission cannot order the incumbent to provide those UNEs.

In the *Triennial Review Order*, the Commission refused to treat evidence that competitors were using their own facilities to compete as "dispositive [evidence] of a lack of impairment." *Id.* ¶ 94. And, as discussed above, it refused to consider at all evidence that competition is occurring using "non-UNE alternatives from incumbent LECs." *Id.*; *see id.* ¶ 102. But those conclusions were inconsistent with *Iowa Utilities Board*, where the Supreme Court held that, if competition is possible without UNEs, the fact that competitors could purchase inputs more cheaply if given UNEs does not demonstrate impairment. *See* 525 U.S. at 390 n.11. And they were inconsistent with *USTA I*, where the D.C. Circuit explained that the only facilities for which the Commission can find impairment are those that are "unsuitable for competitive supply," 290 F.3d at 427 — and facilities that *are* being competitively supplied clearly are suitable for such. After *USTA II*, there can be no serious dispute about this point, as the D.C. Circuit again found that the existence of non-UNE competition "belies any suggestion that the lack of unbundling makes entry uneconomic." 359 F.3d at 592. And, of course, these cases hold that the Commission cannot limit its consideration to competition through self-deployment, but must consider all competition that is occurring without UNEs.

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b. *USTA II* makes clear that evidence of actual, non-UNE competition is dispositive evidence that competitors are not impaired both in the market in which the competition is occurring and in all similarly situated markets. In rejecting the Commission's impairment analysis in the *Triennial Review Order*, the D.C. Circuit held that the Commission may not assume that each geographic market is unique and "treat competition [i]n one [market] as *irrelevant* to the existence of impairment [i]n the other" markets in the country. *USTA II*, 359 F.3d at 575. The Commission "cannot ignore the . . . facilities deployment [in one market] when deciding whether CLECs are impaired with respect to [another market] without a good reason." *Id.* In the context of the impairment analysis, "good reason" is limited to the same types of "structural impediments to competition," discussed below, that are necessary to find impairment. *Id.* at 572, 575. Any determination that markets are dissimilar, moreover, must be supported by substantial evidence, as addressed above. Therefore, if there are no structural differences between two markets — one with non-UNE competition and one without — the Commission must find no impairment as to both markets.

7. The Commission's impairment analysis must be based on appropriate geographic market and market segment definitions.

a. The Commission must identify the relevant geographic markets for purposes of assessing impairment, because "[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment" occurs. *USTA II*, 359 F.3d at 574. As the D.C. Circuit recognized, the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network," *Iowa Utils. Bd.*, 525 U.S. at 389, compels the conclusion that the 1996 Act "requir[es] a more nuanced concept of impairment than" one that is "detached from any